IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 35.

GUSTAV H. KANN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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Before considering the points made by the Government, it is necessary to make some comment on its method of stating certain important facts in the case, creating suspicion of wrongdoing where none actually existed.

For instance, on page 4 of the Government's brief, it is said that the memorandum from Feldman "suggested" a plan for the organization of Elk Mills, whereas the fact was that Feldman did not suggest the plan to the petitioner, but *presented* him with a plan. Before receiving this memorandum, the petitioner did not know that Triumph had been awarded the bomb contract or that Feldman had

already formed a corporation known as Elk Mills and had paid the incorporation costs; and when he received the memorandum he then acted as any other sensible business man, and consulted the corporation's counsel. The Government's statement of the occurrence could leave the impression that the petitioner knew about Elk Mills before the memorandum was presented to him, but the record shows without contradiction that he did not know of it until that time (R. 165).

Much of the Government's criticism centers on the March 17, 1942 meeting of Triumph's board of directors. During that meeting an agreement was approved which provided for Elk Mills to pay Triumph a stated amount per bomb for overhead, and it is undisputed that Triumph realized a profit on this arrangement. The Government complains that when this arrangement was approved, a quorum was not present, but it is important to bear in mind that during the meeting of December 11, 1941, in which the plan for the use of Elk Mills as a subsidiary was first approved, the Government concedes that a majority of the board was present (Gov. Br. 5).

In an effort to show that the banks would have approved the substantial investment in capital assets required to carry out the bomb contract and also to raise the employees' salaries, the Government cites the action of the banks in raising the capital limitation and in paying bonuses to the employees several months *after the Elk Mills plan was put into operation*. However, such action undertaken at a later date has no relevancy on whether the banks would have permitted Triumph to make the necessary expenditures when they had to be made, namely, several months before the actions cited.

It is said (Gov. Br. 8) that the bonus of five thousand dollars to the defendants was "allegedly" in recognition of

their work in eliminating delays in production. The record shows that the delays in production were not "allegedly" but *actually* eliminated, and that Elk Mills became a model plant for the production of incendiary bombs.

On page 9, the Government's brief states that Triumph advanced forty thousand dollars to Elk Mills and that thereafter this sum was paid to the defendants in the form of bonus checks. This statement is true, but there is nothing sinister in this action. This advance was made in accordance with the plan approved by the banks, and the evidence established that not only this sum but all advances by Triumph to Elk Mills were fully repaid and, in addition, Triumph realized a substantial profit.

The Government's narration of the facts connected with the purchase of the land site for Elk Mills is also misleading. The fact that Triumph made a down payment on the site has no particular significance, since the corporation was trying to protect its rights to a waterway (R. 192). The evidence shows that the five key men were ready to pay for the land and, in fact, Forestell, the Government witness, testified that they had given him their checks for the land. The reason their checks were not used was not, as the Government says, "apparently for the reason that the Elk Mills transaction had been discovered by Commander Seidman," but because of the key men's improper manipulations, the entire arrangement was being cancelled and they were being required to return their stock and the fruits of their fraudulent lumber scheme, and all the property of Elk Mills was being transferred to Triumph. Nor is there any significance in the Government's statement that a deed to the property from Triumph to Elk Mills, dated October 1, 1942, was never recorded. Inasmuch as the decision was to cancel the arrangement be-

tween Triumph and Elk Mills, and make Elk Mills a wholly-owned subsidiary, naturally the deed would not be recorded.

The prosecution says (Gov. Br. 12) that when the lumber deal was uncovered the petitioner denied any knowledge of the deal, and the record bears this out. Then the Government says that the petitioner stated "that all parties would be willing to undo what had been done." This method of statement seems to have been employed to convey the thought that the petitioner included himself, or that he was so well acquainted with the attitude of the guilty parties that he could speak for them. The evidence, however, shows that the petitioner learned of the improper lumber deal during this very conversation, and was therefore not in a position to speak for the five individuals who had received the money from the lumber deal. He did state that it was all wrong, and he would see that the money was returned. The petitioner said this, not, as the Government would have the Court infer, because he knew all about the transaction and knew that these men would pay the money back; but he clearly meant that he would use his influence with the five men and insist that they return the money.

ARGUMENT.

I.

The matters referred to by the Government as establishing the existence of a scheme to defraud, and the Petitioner's participation therein, were insufficient to justify submission of the case to the jury.

The fact that the Judge charged the jury fairly, so far as the rights of a defendant are concerned, and told the jury that they had to find fraudulent intent on the part of the petitioner, does not dispose of the question as to whether

there was sufficient evidence in the case on which the jury could fairly base a determination that the petitioner acted with fraudulent design. The Government says that there was evidence tending to contradict the *bona fides* of the plan for the use of Elk Mills as a subsidiary. Mention is made that the bank customarily approved Triumph's requests for permission to grant increases in salaries, but the Government doesn't refer to the fact that these increases were very small and entirely unsatisfactory to the men. Furthermore, the chief motivating reason for the entire plan was the bank's limitation on capital expenditures by Triumph. If only the matter of the men's dissatisfaction with their salaries was concerned, the plan would never have been proposed.

The Government asserts (Gov. Br. 19) that there was no evidence that the dissatisfied employees had sufficient assets or credit to enable them to organize a competing organization, but neither was there any evidence to the contrary. Moreover, the Government's assertion entirely overlooks the fact that the incendiary bomb contract which was awarded to Triumph expressly set forth that the Government would advance up to 30% of the face amount of the contract. Triumph financed the work through this advance, and it is manifest that the same thing could have been done by the key men through their own company. The evidence does pointedly show the initiative exercised by these men through one of them, Feldman, in incorporating Elk Mills without seeking the sanction or approval of the petitioner. Whether they intended to leave Triumph and embark on a business of their own, under the name Elk Mills, is not known.

The Government says (Gov. Br. 19) that the banks would have agreed to almost any plan which would have enabled Triumph to perform its Government contracts.

The misleading nature of this statement is apparent when it is recalled that the letter which Mr. Weil presented to the banks explicitly stated that the plan was necessary because they, the banks, would not permit Triumph to expend the large sum necessary for capital assets. If the banks were ready to sanction any sort of plan as the Government contends (Gov. Br. 19), why didn't they simply tell the Triumph officials that it would be satisfactory for the corporation to make the necessary expenditures, without troubling to consider, as the evidence shows they did, with such care, the details of the plan which called for the use of Elk Mills as a subsidiary. It is true that the bank had previously approved increased capital expenditures by Triumph, but those increases were for comparatively trivial sums whereas, to carry out the bomb contract, Triumph had to expend almost the equivalent of its total authorization up to that date. Nor does the Government mention the unquestioned hostility of the banks at the time when the permission to make the additional investment was necessary. Only a week before, Triumph had received sanction for the expenditure of sixty thousand dollars more in capital assets, but that "authorization" was granted only because it was found that Triumph had already exceeded the limit under a mistaken interpretation of the limitation, and the record shows that on that occasion Triumph was warned to "watch its step" and was informed that the banks would not tolerate the corporation's exceeding its authorization.

The fact that some months after the Elk Mills plan was approved and its success had been demonstrated, the bank authorized capital expenditures of more than double is not the point we are concerned with, and it is entirely irrelevant, for the attitude of the banks when the contract had to be carried out or breached, that is, when the plan was

presented to the banks—the situation at that time should be borne in mind in testing the honesty of the plan for the use of Elk Mills. Moreover, the fact that the banks in May, 1942, authorized the increase in capital expenditures does not show that they would have permitted Triumph itself to make the outlay necessary for the performance of the bomb contract in December, 1941, for when the banks authorized the increase in May, 1942, the company's business was many times what it was in December, 1941, and at that time the loan, and with it the limitation, was extended for another year, to June 1, 1943 (R. 119).

Realizing the manifest weakness of its statement that the jury was somehow justified in inferring fraud from the circumstances recited above, the Government proceeds to argue that even if the organization of a subsidiary was justified, the way in which Elk Mills was actually organized and conducted shows that it was used in carrying out a scheme to defraud. The Government says that the fact that a legitimate device is employed does not exonerate individuals who use such a device as the vehicle for a scheme to defraud, citing many cases in support of that plain proposition of law. Of course, we agree with this as a theoretical statement of law, but it has no application to this case. The fact that Elk Mills was set up as a subsidiary to subserve an entirely legitimate business need and to extricate Triumph from a serious dilemma must constantly be borne in mind, for it provides the ready answer to the Government's assertions of fraud. The observation is ventured that if the affairs of practically any corporation were subjected to the searching scrutiny practiced here, certain transactions or irregularities could be pointed to as suspicious. Of course, this is not suggested as a defense, but merely as a comment on the fact that after the most exhaustive examination of the records and

the internal affairs of Triumph and its subsidiary, Elk Mills, only the insignificant matters mentioned in the Government's brief and hereafter discussed were uncovered, and as to many of these the Court will find that they are criticisms from the vantage point of hindsight.

The Government complains (Gov. Br. 21) that the defendants turned over a million dollar contract of Triumph to Elk Mills, forty-five per cent of whose stock was held by five of the defendants (the petitioner not included), and had thereby caused Elk Mills in six months to make a profit of almost three hundred thousand dollars. It must be remembered that the profits which would be made on this contract were unknown, for this was an entirely new product for the company; and the fact that the venture proved highly profitable is no proof of fraud. Moreover, Triumph itself made a considerable profit, for it owned fifty-five per cent of the stock and in addition, received 10% on the contract, and made a profit on the overhead charges (Pet. Br. 14-15). This case presents a different picture from the ordinary one in which fraud is asserted. The complaint usually is that a particular individual or corporation has been caused to lose money through the workings of a fraud. Here the complaint is not that Triumph lost money, but only that Triumph did not make as much money as it could have if it had performed the contract itself. But if Triumph could not perform this contract because of the limitation against its making the required capital outlay, why wasn't this arrangement, even viewed in retrospect, as good an arrangement as could have been made? The Government did not supply any evidence that Triumph could have sublet the bomb contract upon more favorable terms.

The Government asserts that the manner in which the Elk Mills transaction was treated by Triumph's board of

directors shows they realized the scheme was fraudulent but the evidence contradicts this contention. The fact that the notice of the December 11, 1941, meeting did not expressly mention that the organization of a subsidiary corporation was to be discussed is relied upon as an indication of fraud. Contrary to the Government's statement that the question of a subsidiary corporation was "discussed" as early as December 3, the evidence shows that the first knowledge the petitioner had that the bomb contract had been awarded, or that a subsidiary corporation called Elk Mills had been created, was when he was handed Feldman's memorandum on December 3. The petitioner then acted as any reasonable business man would have, and went to see the corporation's counsel, Mr. Weil. The meeting of December 11 was called to seek a solution to the dilemma in which Triumph was placed. It was not known that the plan evolved would be to utilize Elk Mills as a subsidiary, and it was only after careful discussion that this proposal was approved by a majority of the board of directors, with the corporation's counsel concurring.

Again, contrary to the assertion by the Government (Gov. Br. 22), the Elk Mills contract with Triumph to pay for the overhead furnished by Triumph was openly discussed at the March 17, 1942, meeting and incorporated in the minutes. It is true this took place after MacBride and Shirley had left the meeting, and the resolution introduced by these directors in October (when they were naturally trying to do everything to put themselves in the clear) shows that they left the March meeting before its termination. The prosecution then states that, according to the minutes of the March 17th meeting, the modification of the Elk Mills contract was approved before a report was read by Shirley, and that MacBride recalled having heard the report. From this the Government in-

ferred that the minutes were not a true record. However, this inference is based solely on another inference, namely, that the minutes were a chronological record of the occurrences at the meeting. The record does not show that the minutes were reported in the chronological order of their occurrence at the meeting. Consequently, the inference founded upon another inference must fall. *U. S. v. Ross*, 92 U. S. 281; *Wharton's Criminal Evidence*, Vol. 1, Sec. 64; cf. *U. S. v. Faleone*, 311 U. S. 204, 211.

Besides, all these inferences are advanced in an effort to show that the plan was a secret one, but, as our principal brief points out, the full and detailed disclosure made to the banks, the free access to the minutes afforded the Directors, and the large sign, "Elk Mills Loading Co.", on a door in the main corridor of the Triumph building, clearly show that the plan for the use of Elk Mills was apparent to anyone who would take the trouble to come down to the plant.

The alleged haste in awarding salaries of fifty-two hundred dollars, when stated in this manner, may seem to be ground for suspicion, but when we consider that the general practice of corporations is many times to vote salaries for a year in advance, the shadow is dispelled. Furthermore, there was no evidence whatever that these salaries were unreasonable or excessive. The evidence showed—and the Government refers to the fact (Gov. Br. 21)—that in six months Elk Mills made a profit of $300,000. Since the contract was to be performed in one year, it can fairly be assumed that a profit of $600,000 would have resulted. Surely salaries to eight men, who were responsible for such an achievement, aggregating $41,600, less than one per cent of the company's annual profit, cannot be considered excessive or as an attempt fraudulently to siphon off profits through the declaration of exorbitant salaries.

As to the Government comments on Weil's letter (Gov. Br. 23), it is important to note that it was written sometime after the Elk Mills plan was put into effect and was concerned principally with tax matters. The fact that the attorney sometime later advised against awarding salaries does not make the previous award of such salaries in any way fraudulent. Mr. Weil was concerned with what the attitude of the stockholders might be; it turns out that no stockholder has ever asserted a claim that the use of Elk Mills and the award of salaries was a subterfuge to obtain additional compensation. Even after this prosecution was brought, no stockholder has appeared to charge the petitioner with any fraud in this entire matter. The Government next questions whether the petitioner performed services sufficient to call for his being given a bonus. The prosecution thus is attempting to substitute its ideas as to when a bonus should be declared for those of the men who were in charge of this corporation. These men had enabled their corporation, through a subsidiary, to fulfill a contract for vitally needed bombs in the war effort and the company made a handsome profit. Why were they not entitled to a bonus?

In order to strengthen its argument, hereafter considered, on the use of the mails in furtherance of the alleged fraud, the Government injects into its argument on the lumber deal an additional element unsupported by evidence. The evidence established without contradiction that the five key men defrauded Triumph and secured some twelve thousand dollars as the loot. Further than that the record is silent, and for all that the evidence shows the scheme was complete in and of itself; but the Government theorizes that the loot received by the five key men was to be used by them in paying for the land site for Elk Mills and thus the land would cost them nothing; and thereafter

when they transferred the land for the forty-five per cent stock of Elk Mills they would acquire the stock without paying anything. This is a supposition made without basis in the record and cannot be established on the prosecution's bare assertion.

The petitioner's actions when the lumber scheme became known to him clearly show his innocence (Pet. Br. 16, 33-6). The Government states that the petitioner's contention that he knew nothing about this fraudulent scheme was fairly summarized in the Judge's charge. But the case should never have been submitted to the jury for the evidence was insufficient as a matter of law. The Judge said (R. 227):

> "And the Government contends that Mr. Kann did know all about it. The evidence as to that *is general* rather than specific, except insofar as Jackson's personal testimony is concerned * * *." (Italics supplied.)

We thus see that, despite the Government's assertion that the petitioner's contention was fairly summarized, there was no evidence which had any tendency whatever to prove the petitioner's connection with this scheme, other than that of Jackson, which had no probative value (see discussion, Pet. Br. 33-7). Nor were the jury entitled to infer that the petitioner knew that when his nephew referred to the lumber bill he was not talking about outside lumber purchased by Jackson. The record shows without contradiction that the petitioner had nothing to do with construction or the payment of bills. Why would he know that the "lumber bill" did not refer to lumber purchased on the outside by Jackson? Particularly so when the evidence showed that Jackson was making lumber purchases all along. And the mere fact that the beneficiaries of the lumber deal were employees of Triumph in no way

tends to show that the petitioner knew anything about their improper manipulations. Finally, it should be borne in mind, the evidence showed that the petitioner made only periodic visits to the plant and office of Triumph at Elkton, and that he was not in active control of the enterprise, which was under the supervision of Mr. Decker, who resided at Elkton.

This completes the list of points relied on by the Government as amounting to substantial evidence on which the jury could properly find a verdict of guilty. We earnestly submit that the occurrences, considered separately or together, were incapable of furnishing the basis for a finding of guilt. However, when the case was submitted to the jury, in view of the subject matter of the case, (the performance of an incendiary bomb contract for the United States Navy during a period of war) with the heightened feeling toward anyone charged with fraud in connection with the production of munitions, the guilty verdict was likely enough, but completely unjustified.

II.

The evidence was insufficient to show that the Petitioner caused the mails to be used or that the mails were used for the purpose of executing the alleged schemes.

Under the statute, the prosecution was required to establish:

(A) That the petitioner caused the mails to be used; and

(B) That the use of the mails was for the purpose of executing the scheme.

Although the Government concedes that it was required to prove both elements, it succeeded in proving neither.

(A) Causing the use of the mails.

Contrary to the assertion in the Government's brief, we have never conceded and do not now concede that the evidence was sufficient to show that the petitioner caused the use of the mails.

Although the trial court correctly charged the jury that the mailing "must reasonably have been foreseen—more than possibly", the problem is not disposed of, for it is necessary to inquire whether there was *evidence* from which the jury could determine that the petitioner could reasonably have foreseen that the mails would be used.

The determination of a question of causation, such as this, must be governed by the peculiar facts of the particular case. Therefore, the reported cases, while sometimes furnishing valuable analogies, can at best do no more than indicate the correct general principles, leaving the ultimate determination to the court before which a case is presented. Examination of the facts in the present case, it is submitted, will establish that the petitioner did not cause the use of the mails within the meaning of the statute.

The evidence shows that Willis' bonus check (third count) was drawn on the local Elkton bank and that he was one of the local consultants employed and evidently residing in Elkton. According to all reasonable probability or foreseeability, this check on the local bank would be cashed or deposited in the local bank on which it was drawn, and no use of the mails would then have taken place. The petitioner cannot be said to have contemplated or reasonably have foreseen that this check would be deposited by Willis in a bank in Newark, Delaware, where he maintained an account, the existence of which the record does not show the petitioner knew.

The trial Judge was hesitant about this point, and expressed himself as follows (R. 204):

> "The Court [speaking to the prosecutor] But these checks, of course, at least this second check you are talking about now, is a check of the Elk Mills, and there is nothing to show that it was contemplated that it should be otherwise than delivered to Willis locally and cashed by him locally."

To this comment by the Court the record shows the prosecutor could not supply a satisfactory answer. Nevertheless, the case was submitted to the jury. Let us suppose that the bank in Newark, which is not many miles distant from Elkton, had used a messenger, as is many times done where the distances are not great (as for instance, with respect to the check set forth in count 1, abandoned for that reason), the mails would never have been used on this check.

The Government seeks to establish a causal connection between, not the actions of Willis and the Newark bank in mailing the check, but between the petitioner and the bank's use of the mails. We submit the causation requisite under the statute must be more direct than that shown by the facts in the instant case. We do not disagree with the principles enunciated in the numerous cases cited by the Government. In most of them, as in the *Kenofskey* case, 243 U. S. 440, the defendant was shown to have unquestioned knowledge that the mails would be used and the scheme itself directly envisioned the use of the mails in its execution. But we submit that the mailings by the banks in the present case were not envisioned or contemplated and at most merely followed an executed scheme.

An authority closely in point is *Spillers v. U. S.*, 47 F. (2d) 892 (5 C. C. A., 1931), where five checks, signed by the de-

fendant and purporting to be profits from machines, were sent by mail to one of the defrauded parties in another state. The checks were deposited in a bank which in turn mailed them to another bank, the *latter* mailing being the basis of the prosecution. The argument was made that the defendant must be presumed to have known that in the ordinary case the payee would deposit the checks *in their city* and that the bank receiving the deposit would use the mails in forwarding the checks for clearance. The court rejected this contention, saying:

> "There is nothing to show that the appellant knew or had any reason to know, or intended that any of the parties to whom checks were sent would deposit them in banks which would in turn mail them * * * for collection or that he in any way induced the deposits. So far as he was concerned, the scheme was complete when he sent the checks to the purchasers of the machines. It cannot be said * * * that he knowingly caused the letters to be mailed as charged."

Certainly, the mailing by the Newark bank in the instant case of Willis' check was as remote from the petitioner's thoughts as the mailing in the case cited, if not more so. In the *Spillers* case, the defendant himself mailed the checks to the victims, and there was more room for argument that he had put into motion a train of circumstances that would lead to the use of the mail on those checks. In the present case the petitioner did not himself deposit the check, it was done by Willis, so that it might be said that he was one degree further removed from the causative chain, as compared with the situation in the *Spillers* case. Moreover, in the case cited the checks were sent to another city and the recipients would likely deposit them in a bank of their city, and the bank would then ordinarily mail the checks for collection; in the case at bar, however, the check

was not mailed to a distant city, but was drawn on a local bank and given to the local payee. According to all reasonable probability, therefore, the check in the instant case would be cashed or deposited with the local bank on which it was drawn.

In making this argument we are fully cognizant of the rule, expressly adopted in the *Spillers* case, that a mailing by an innocent agent, which is directly caused by the scheme, is sufficient to come within the statute, but here the chain of causation is entirely too remote, we submit, to enable one to say that the appellant reasonably contemplated or foresaw the use of the mail.

With respect to the use of the mails on the Jackson check to the five key men (second count), the evidence was insufficient to prove the petitioner's participation or even knowledge of the scheme. If he was not a party to this scheme, he could not be said to have caused the mailing of the check.

The trial judge expressed the same thought when he was considering whether to send the case to the jury: (R. 204)

> "There is one thought that occurred to me about this first check and as to the defendant's responsibility in regard to it. He denies any knowledge of ever having heard of that check or any knowledge of the arrangement whereby these so called key men were paid by this so-called lumber account. If he never knew anything of the check and it was not within the purview of his knowledge that such a check would be given, it is difficult to understand how he would be responsible for the mailing of it and collecting it."

However, despite the doubts which he so clearly expressed and which were so pertinent, the Judge concluded:

> "But, I suppose, that is a matter for the Jury".

It is precisely in this fashion that questions which should have been decided as matters of law, as for instance, the sufficiency of the evidence to show that the mails were used "in execution" were resolved by "supposing that they were matters for the Jury". The Government adopts the same position in this court and seeks to close the door on further careful examination by resorting to the same magic phrase.

Even if Kann's complicity in the lumber deal was properly left for the jury's determination, he did not cause the mails to be used on the Jackson check. It is conceded by the Government that the petitioner had nothing to do with cashing this check, nor did he get any money from it. So far as the evidence shows, the petitioner did not know that Jackson would pay these men by check. The contractor could easily have decided to cash the check given him by Triumph and pay the cash proceeds over to the five men instead of giving them his check in the same amount. Besides, the payees could have cashed the check at the not far distant Wilmington Bank on which it was drawn. Moreover, in view of the short distance between the banks, the Wilmington Bank instead of using the mails to effect collection of the check could have used another means, such as a messenger. It is to be noted that evidently this occurred with respect to the check set forth in count or which was abandoned by the prosecution because the mails were not used in the collection of that check. It is, therefore, entirely reasonable to say that the Wilmington Bank could have used a means for collection other than the mails to clear Jackson's check, just as the Pittsburgh Bank did on the check in the first count.

It may be that where the use of the mails is by a confederate such use need not be so clearly foreseeable as where the use of the mails is by an innocent agency unconnected

with the scheme. In the latter case the decisions seem to require that the evidence show the schemer to have knowledge that the mails would be used. Usually this is clearly proved because the schemer's actions inevitably lead to the use of the mails or the scheme directly contemplated the use of the mails.

Cf. *U. S. v. Kenofskey, supra*, *Weiss v. U. S.*, (C. C. A. 5, 1941) 120 F. (2d) 472, *Mitchell v. U. S.*, 126 F. (2d) 550, *Clarke v. U. S.*, 132 F. (2d) 538.

Another pertinent observation is that the Government's cases which are cited in support of the argument on causation consist in the main of cases in which "lulling" letters were sent by the accused and "kiting" cases.

Spivey v. U. S., 109 F. (2d) 181, *Davis v. U. S.*, 125 F. (2d) 144, *U. S. v. Feldman*, 136 F. (2d) 394, *Guardalibini v. U. S.*, 128 F. (2d) 984, *U. S. v. Lowe*, 115 F. (2d) 596.

Little argument is necessary to demonstrate the difference between the use of the mails by a defendant in sending a letter, in contrast to the use of the mails by a bank in mailing a check for its reimbursement. In sending a letter it is clear that the defendant directly causes the use of the mails, but where a bank uses the mails, it is submitted, it must be shown that the defendant on trial foresaw or contemplated that such use would take place in the execution of the scheme. Nor are kiting cases applicable because the basis of the scheme in those cases is the banking practice of mailing checks for clearance, thus giving the accused time to use the credit given him. In such a scheme the use of the mails is directly caused and contemplated by the defendant. By no stretch of the imagination can it be said that the use of the mails in the instant case was conceived of as a part of the alleged scheme.

(B) Use of the mails in execution of the alleged scheme.

Counsel for the Government seek to convey the impression that we contend that in all cases where the money is received by the schemers, the fraud is at an end and therefore a use of the mails thereafter cannot violate the statute. We desire to make it clear at the outset, that we do not contend for any such sweeping, inflexible rule. We do contend, however, that where, as in the present case, the payment and receipt of the fruits of the alleged fraud and the element of irretrievable loss to the victim concur, and nothing further remains to be done, the scheme is at an end.

In casting about for some theory on which plausibly to maintain that the scheme here alleged was not at an end when the mails were used by the banks for reimbursement, the prosecution invokes the rule that even where a scheme has ended, if thereafter the accused uses the mails to lull the victim into a state of repose, or to obtain more time to perpetrate additional frauds, or as an aid in avoiding detection, such use violates the statute. The rule is a perfectly valid one and is well supported in the decisions, but it has absolutely no application to the facts of the case now before the Court; and it is necessary to resort to an ingenious torturing of the facts to make the "lulling" rule even appear to be applicable here. In the lulling cases so liberally cited in the Government's brief, *U. S. v. Riedel*, 126 F. (2d) 81, *Freeman v. U. S.*, 244 F. 1, *Davis v. U. S.*, *supra*, *Brady v. U. S.*, 26 F. (2d) 400, (although it is conceivable that a check by itself could be used for that purpose), we usually find the mails used to transmit a letter *to the victim* in order to quiet his fears and to prevent his taking action that might bring about detection and punishment, and, in some cases, prevent the perpetration of additional frauds.

In the present case no letter was sent to the victim but the banks, for their own purposes, merely used the mails to obtain reimbursement on checks which they had cashed. In the cited cases we have victims who, if not allayed, could and would act to frustrate the plot. Here, however, notice could not get back to the alleged defrauded party, Triumph, for the checks mailed were not its checks. Jackson's check (second count) was given to the five men in return for a check of Triumph, and if his check did not clear the notice would only come back to Jackson who would be required to make good.

With respect to Willis' check (third count), it was issued by Elk Mills, which the Government contends was the device for effectuating the fraud. The defendants were in full control of Elk Mills and would have been the only ones to receive any notice of stoppage. Consequently there was no independent victim capable of frustrating the alleged scheme who was in any way lulled by the mailing of the check. Moreover, a consideration of this point is somewhat unrealistic because since the defendants were in full control of Elk Mills, Willis' bonus check had to clear and therefore knowledge of the fraud could not be obtained.

Under the circumstances of this case, therefore, the use of the mails cannot be said to have been to avoid detection or to gain time in which to make use of the money derived from the fraud.

In the cases involving the kiting of checks, the schemes are directly based on the banking practice of forwarding deposited checks for collection which enables the schemer to obtain credit while the check is in transit. As the Circuit Court of Appeals remarked in *U. S. v. Lowe*, *supra*, at page 598:

> "the defendant included in his scheme the use of a banking practice which necessarily required the for-

warding of the deposited check for collection, a practice which would enable the defendant to utilize, at least temporarily, the credit given him by the Chaseburg Bank; and the utilization of this practice was as much a part of the scheme to obtain credit as the drawing and presenting of the worthless check."

These cases have no application to our case for here the alleged fraudulent scheme, according to the Government, was based on the utilization of a subsidiary and did not involve a banking practice as part of the scheme.

We now consider the authorities discussed in the Government's brief and the other points relied upon to show that the mailing of the checks by the banks for reimbursement was in some way *in furtherance* of the schemes alleged.

The Government contends that the decision in *Stapp v. U. S.*, 120 F. (2d) 898 (C. C. A. 5) rests in part on the finding that the defendant had done nothing to "cause" the mailing. While it is true that the court did mention that the defendant did not cause the use of the mails, this was said at the very end of the case without any discussion but if the opinion is examined, it will be found that the Court concerned itself primarily with the question as to whether the victim was irretrievably defrauded when the mails were used by the bank. The prosecution in our case comments that the defendant in that case did not plan to obtain any further funds from his victim, and that the clearing of the check would have had no effect in aiding the defendant to keep the money since he had already absconded before the mails were used. However, these statements are not found upon a careful reading of the case. They must therefore be regarded as gratuitous additions to the facts.

The Government attempts to distinguish *U. S. v. McKay*, 45 F. Supp. 1001 (E. D. Mich.) from the present case, but

it only succeeds in demonstrating the apposite nature of the cited case. In the *McKay* case we have a close analogy to the situation here. The victim in that case was Ford; here it was Triumph. Bass-Luckoff, Inc., the advertising agency, was the organization to which the victim paid the money and which in turn gave its check to the schemer. In our case Elk Mills was the organization to which the alleged victim, Triumph, gave its money and which in turn issued its check for the bonuses to the defendants. Incidentally, McKay was a responsible official connected with the advertising agency as is shown by his personal contact with Harry Bennett, Ford's personal relations representative. He was not an absconder. The basis of the decision in that case was not that all relationship had ceased between the victim and the schemer for that was not shown or even mentioned in the court's decision, but simply that the scheme was complete since Ford was powerless to retract and the defendant already had the money before the mails were used. Moreover, the facts in the *McKay* case show that two frauds were worked at different times on Ford. From the prosecution's position in this case it does not seem unreasonable to infer that the same considerations were urged there as here, namely, that the mailings were resorted to in order to gain time to perpetrate other frauds and to lull the victim into repose, but it is evident from the opinion that such theories played no part in the decision of the case.

In *Dyhre v. Hudspeth*, 106 F. (2d) 286 (C. C. A. 10), the opinion simply stated that the fraud was complete when the schemer secured the merchandise which he was after and that, therefore, the use of the mails by the banks in thereafter sending the fraudulent checks on for reimbursement occurred after the scheme had been consummated.

In *Steiner v. U. S.*, 134 F. (2d) 931 (C. C. A. 5), the scheme was obviously a continuing one and it was worked again and again in essentially the same manner. The bills or statements were mailed by the defendant to obtain the money and such use of the mails was therefore in furtherance of the continuing scheme. In addition *it was proved* in that case that the scheme required for its continued success the payment of money to a confederate, the chief clerk at the Tax Assessor's office, for if payments were not made to him, the clerk would not have continued to make the fraudulent tax assessments and the scheme would have died. The statements were sent out, therefore, not only to obtain the fruits of the fraud but also to obtain money so that the confederate could be paid and the scheme kept in operation. It should be noted that the fact that money was to be received by means of the statements and that money would have to be paid to the clerk in order to keep the scheme in operation, were not merely *suggested* by the prosecution, as is being done here in an effort to establish that the mails were used in execution, but were *proved by evidence* in the case. We fail to see how the use of the mails by a defendant himself in sending out statements in order to secure the fruits of the fraud has any similarity to the situation in the instant case where the mails were used by the banks on their own account to obtain reimbursement after the money had already been obtained by the defendants.

Similarly, the facts in *Dunham v. U. S.*, 125 F. (2d) 895 (C. C. A. 5) furnish an apt illustration of the use of the mails both in the execution of the scheme and also to lull the victims into repose. It was shown there that the schemer mailed false statements to the victims leading them to believe that all was well and thus inducing new investments. It is indeed difficult to imagine a case in which

the mails were used more directly both in carrying out a scheme and in lulling the victims.

The discussion (Gov. Br. 42) of the *McNear v. U. S.* (60 F. (2d) 861) and *Stewart v. U. S.* (300 F. 769, C. C. A. 8) cases is accurate but we fail to see how the rulings or the facts in them have any tendency to support the Government here.

In the *McNear* case, as in *U. S. v. Dale*, 230 F. 750, the prosecution failed because the fraud was complete before the mails were used. In the *Stewart* case letters were sent to collect the balance of the funds received from the fraud, namely, the money due on the victims' lien notes. Consequently the use of the mails was in execution of the scheme. We also agree with the decision in *Newingham v. U. S.*, 4 F. (2d) 490 (C. C. A. 3) where the mails were used in an attempt to obtain additional monthly payments from the victim. This was *proved* to be a part of the scheme in that case and the mere fact that the efforts were unsuccessful obviously has no bearing on the schemer's liability under the statute.

Likewise, in *Mitchell v. U. S.*, 118 F. (2d) 653, the Court decided that the scheme was fully consummated when the letters were mailed to the land office for recording. The Government's discussion of the second *Mitchell* case (126 F. (2d) 550), only presents new difficulties for the prosecution in the present case. In the first *Mitchell* case, there was a reversal because a continuing conspiracy had neither been alleged nor proved. In the second case, however, where eight similar and related frauds were perpetrated, a continuing scheme was alleged *and proved*. The testimony in the case showed that the defendant stated that the recording of the deeds was necessary and that he told the victims that upon return of the deeds from the record

office, they could be sold at a large profit to a company controlled by the defendant. The court said that without the allegation of a continuing scheme and the proof in support, a conviction could not have resulted. It will be noted in our case that the indictment *does not specifically allege a continuing scheme*, and if we disregard the prosecution's conjectures, there was *no proof* in the record that any bonuses were to be issued in the future.

Moreover, as the Court remarked in the second *Mitchell* case, the direction to send the deeds for recording was for the purpose of lulling the victims and to gain time for the defendants to escape apprehension. None of these considerations play any part in the present case.

The prosecution repeatedly points to the Judge's Charge to the Jury as being fair (Gov. Br. 17, 18, 24 fn., 25 fn., 27, 31, 44, 45). But that does not help the Government here for while it is true that where sufficient evidence has been presented to show that the mails have been used in execution, the question is ultimately one for the jury, the Court must first determine as a matter of law whether there is sufficient basis for such finding. Otherwise the question could always be resolved as one for the jury and no reversal could result if it were merely shown that the mails had in fact been used. In the case at bar the evidence was insufficient to support a finding that the mails were used in furtherance of the alleged schemes and that the petitioner caused the mailings. Therefore the submission of the case to the jury, no matter how carefully phrased to safeguard the rights of a defendant, constitutes reversible error.

In our case two separate transactions were shown: the lumber deal and the payment of the bonuses. The evidence furnishes no support for the assertion that the scheme was intended to continue "at least as long as Elk

Mills was performing the contract." Simply because the prosecution has a theory that the defendants intended to continue the alleged scheme beyond the receipt of the particular bonuses shown in the evidence, is not enough to make the scheme in the instant case a continuing one. It is submitted, the prosecution must point to other instances in which the mails were used and not merely assert that it was intended that there would be other mailings. If by merely asserting that a scheme was a continuing one and that other mailings were contemplated, the scheme in a particular case could be converted into a continuing one, the prosecution in all mail fraud cases could, by *alleging* the scheme in very broad language, avoid the determination of the point so closely considered in the reported decisions, namely, whether the scheme was fully terminated before the mails were used.

The Government states (Gov. Br. 45) that the salaries and bonuses could not have been paid under this scheme unless the payments were made in normal fashion by Elk Mills' checks. According to the Government, the defendants completely dominated and controlled Elk Mills. Why then was it necessary that the payments be made in normal fashion by Elk Mills' checks? Triumph, the defrauded party, could not learn of the fraud if the checks were not paid because the knowledge of non-payment could only come to Elk Mills which had issued the checks but which was under the defendants' control. Therefore, despite the Government's suggestion (Gov. Br. 45), it is difficult to see how any individuals interested in Triumph's finances could have discovered the plot whether the bonus check did or did not clear.

The Government states (Gov. Br. 46) that the bonus checks were only part of a "continuing process" of draining

off Triumph's funds. But this is only a theory, for no bonus checks were introduced in evidence other than the one issue, dated May 27, 1942, nor was there any evidence that further bonuses would be issued.

Next, the Government compares the present case to the *Decker* case, 140 F. (2d) 378, but there is no similarity whatever between them since the evidence in the cited case clearly showed the continuing nature of the scheme there and the exact similarity in the mailings. The prosecution does concede, however, that the checks in the instant case were *not of a similar nature* (Gov. Br. 46) and this is significant because where (in the absence of evidence directly establishing the continuing nature of a scheme) the courts have found a continuing scheme present, the similarity in the mode of executing the related frauds and the similarity in the mailings is invariably pointed to as an indication that the scheme was of a continuing nature. See *U. S. v. Lowe*, *supra*; *Hastings v. Hudspeth*, 126 F. (2d) 194 (C. C. A. 10).

Contrary to the Government's statements (Gov. Br. 46) that salaries were drawn after the bonus checks were paid, the record shows that the bonus payments were made on May 27, 1942, and the statement of withdrawals on page 128 of the Record is a schedule up to July 31, 1942, and it was not shown in the evidence that any salaries were paid after the bonuses.

We next consider the lumber transaction. The prosecution contends (Gov. Br. 47) that it was part of the scheme for the five payees of Jackson's check (the key men) to acquire their Elk Mills stock by using the fruits of the lumber fraud. *The evidence, however, does not support this linking of the lumber deal with the acquisition of the stock*, but merely shows that the five men worked a

fraud on Triumph and obtained and divided the money. The Government's *assertion* that they intended to use the money obtained from the lumber deal in paying for the stock is injected into the case to meet the difficulties in the way of showing that the use of the mails on Jackson's check was in execution of the scheme. For if the scheme was, as the evidence showed, simply a plot to defraud Triumph of money, when Triumph issued its check and the men cashed it and received the money, the matter would be at an end. But if the prosecution's assertion is added, it could be argued that the scheme was not complete until these men paid for the land and in turn transferred it and received the Elk Mills stock. We insist that since there was no proof as to whether the men intended to use the lumber money to purchase the land and thus receive the stock without paying for it, the prosecution cannot extend the scheme shown in this case by its own assertions.

The evidence furnishes no basis for a finding of the petitioner's complicity in this scheme. If the single question and answer (R. 66) on which the Government must rely is fairly read, it becomes apparent that the petitioner answered that he did not see why the bill should not be paid, in a completely offhand manner, while walking down the corridor. The payment of bills and construction matters, it was shown indisputably, were not part of his duties and his answer indicates that he was mildly surprised that the question was asked.

The Government contends (Gov. Br. 47-8) that it was necessary for the Jackson check to clear in order that the payees could keep the money. In support of that contention, it is said that these men were not absconders and lived in the vicinity of Elkton and would have had to make the check good if it had not been paid. As to this, there was no showing in the evidence that the five men would or

would not abscond. Besides, the determination of amenability to punishment under the Mail Fraud Statute does not rest on whether the schemers are absconders or not.*

The theory urged by the Government has no validity, and does not enter into the determination of whether the scheme is at an end. The true test established by the many decisions on the subject is (1) whether the victim has suffered an irretrievable loss and (2) whether the schemers have received the money before the mails are used. If both these elements concur and nothing remains to be done, as in the present case, the scheme is at an end. Further, the absconding theory in its application would be beset with perplexing difficulties. If, for instance, a schemer after fully executing his scheme had absconded but could be located, could he then be prosecuted upon the theory that, in view of his apprehension, the scheme was not complete because he might be made to reimburse the victim? It seems also that consideration would have to be given to whether the schemer in a particular case had the money with which to make reimbursement. None of these matters were inquired into in the case now before the Court, and, aside from this, it is submitted that the theory is not a true guide for determining the completion of the scheme.

Again, on page 48 of its brief, we find the Government repeating its *theory, unsupported in the evidence*, that the stock was to be paid for from the fruits of the fraudulent lumber deal. It seems that the Government is desperately trying to effect by the mere force of reiteration

* Here, it is to be noted, the Government relies on its "absconding" argument but later it discards that theory and says that it is not the true test of the law. As another observation, the numerous cases on the subject do not rely on any theory of the schemer being an absconder. For instance, in the *McKay* case, where the prosecution failed, the schemer was a responsible official of an advertising agency who was not shown to be contemplating flight immediately after the successful completion of his fraud.

an enlargement of the scheme and to link by mere theorization, the payment of the Jackson check to the eventual acquisition of the Elk Mills stock as an additional step in the scheme.

The comparison attempted to be drawn (Gov. Br. 48) between this case and the *Kenofskey case*, 243 U. S. 400, is clearly inappropriate. In that case the mails were directly used in the execution of the scheme because the mails were the means by which the fraud was to be effected and the schemer calculated that the mails would be used as they had to be for the scheme to succeed. In our case, however, the Government is attempting to establish by conjecture that a scheme which on its face was complete in and of itself included some additional step not shown in the evidence.

The reference (Gov. Br. 48) to the case of *Bogy v. U. S.*, 96 F. (2d) 734 (C. C. A. 6), does not furnish any support to the Government. In that case the release of the defendant from liability was the principal object and, without this element, Bogy's scheme would have been meaningless. But the issuance of Jackson's check in the lumber deal was complete in and of itself and so was the issuance of the one bonus. Moreover, the *letters sent by the defendant* in the cited case to his victims were intended to lull them into a sense of false security and thus postpone their acting and therefore the mailings helped to delay discovery of the fraud. The Government's insistence (Gov. Br. 49) that until the defendants in this case not only had the money but were certain their possession would not be questioned they could not and did not use the money to pay for the land, finds no support in the evidence and, we repeat, it is simply an assertion put forward to meet the difficulties that stand in the way of showing that the

mails were used for the purpose of executing the scheme alleged.

In the concluding portion of its argument on furtherance, the Government casts aside the absconding argument and maintains that the cashing of a check by a defrauder on an out of town bank "sets in motion the train of circumstances which necessarily causes the use of the mails," and therefore the mailing following that act is in execution of the scheme. The argument is made that the cashing of the check and its mailing are inseparable, and if it be conceded that the cashing is in furtherance, the mailing is, too. The fallacy in that argument is that the two acts—the cashing and the mailing—are not inseparable. In the present case the first act, the cashing of the check, was in furtherance, because it was the means by which the alleged schemers obtained the fruits of their alleged fraud; but the second act, the mailing by the banks which cashed the checks in order to obtain reimbursement, a distinct action resorted to not by the defendants but by the banks, was done for the banks' purposes and, therefore, not in furtherance of the fraud.

The Government's contention (Gov. Br. 52-53) seems to be that if the use of the mails is brought about by the deliberate act of the defendant the statute is violated. If this rule were adopted it would necessarily result in a most extreme extension of the Mail Fraud Statute and would result in bringing practically all cases of fraud within the federal jurisdiction, contrary to the intention of Congress. That view is unsupported in the decisions and it would nullify the vitally important language in the statute that the mere use of the mails is not sufficient, but that such use must be *for the purpose of executing the scheme* before the statute is violated. The theory urged upon the

Court disregards this limiting language and converts the statute into one authorizing prosecution where only a use of the mails is shown. We feel confident, however, that the Court will not adopt this interpretation, for it would run counter to the explicitly declared intention of the Congress.

The Government states that this view, which in essence reduces the question solely to whether a schemer caused the use of the mails, is the rationale of the decisions in *Hart v. U. S.*, 112 F. (2d) 128 (C. C. A. 5) and *Tincher v. U. S.*, 11 F. (2d) 18 (C. C. A. 4).

However, when these cases are examined it is found that in the *Hart* case the court never expressed any theory of the nature now urged by the Government, and the lengthy discussion by the court in that case as to whether the victim had been irrevocably defrauded at the time the mails were used shows that the court judged that, under the facts of that case, the victim was not defrauded until the check had cleared. In the *Tincher* case, as our principal brief shows, the court expressly found that the mailings were in furtherance because they were the means by which the money was received. Neither of these courts expressed itself in such a way as to justify the Government in stating that the rationale of these cases is in harmony with the theory now advanced. The basic defect in the Government's theory is that the proof of causing the mailing, no matter how clear, is not sufficient to supply the other essential element, namely, that the mails must be used for the purpose of executing the scheme.

As previously shown, contrary to the Government's treatment (Gov. Br. 51), the *Stapp* case was decided principally on the ground that the mails were not used in the execution of that scheme and it is a persuasive authority

in the case now before the Court; while the Government's attempts (Gov. Br. 51) to distinguish *Dyhre v. Hudspeth*, *supra*, merely strengthens our argument, previously made, that the petitioner did not cause the mails to be used.

Although previously the prosecution interpreted the *McKay* case, 45 F. Supp. 1001, as in harmony with its contentions, it seems to have changed its mind about this case in the last part of its brief and contends that the case was erroneously decided (Gov. Br. 51-52), because it is said, the court failed "to realize that the scheme was not complete until the defrauder had obtained his spoils." However, this is not a valid objection because in that case the evidence showed that not only was the victim defrauded beyond recall, but that the schemer obtained the spoils when the checks were cashed.

The remaining comments concerning the rule that should be followed where the schemers do not abscond have previously been considered (*supra*, 29-30). This theory does not take into account the fact that the law is concerned with determining when the victim has been irretrievably defrauded, and if, with that element, it is also established that the schemer has received the loot and nothing more remains to be done; the subsequent use of the mails by the banks for reimbursement cannot be regarded as in furtherance of the scheme.

At all events, it is certain that when the banks cashed the checks in the instant case, Triumph, the alleged victim, was defrauded beyond recall and whether, thereafter, there was a chance for recovery of any of the money is subject to too many uncertainties to provide a satisfactory test under the statute.

CONCLUSION.

The case should not have been submitted to the jury because there was not sufficient evidence on which the jury could find that a fraudulent scheme or schemes existed and that the petitioner was a party thereto.

The Government likewise failed to establish that the use of the mails was for the purpose of executing the alleged schemes. The petitioner did not "cause" the use of the mails on the checks which were shown in evidence to have been mailed by the banks for reimbursement. His connection with such use of the mails was too remote to establish causation under the statute. As to the use of the mails in the execution of the alleged schemes, the evidence showed the schemes were complete when the checks were cashed, and the Government failed to establish that the banks' use of the mails thereafter on their own account for reimbursement had anything to do with the success of the schemes or had any tendency to help in their execution, hence the mails were not used in furtherance. The prosecution merely proved that the mails were used without showing that such use was for the purpose of executing the alleged fraudulent schemes.

It is respectfully submitted the judgment should be reversed.

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